



# Lamoine Board of Appeals

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## Draft

### Minutes of June 4, 2014

Chair Griff Fenton called the meeting to order at 6:30 PM

Present were: Appeals Board members Hancock “Griff” Fenton, Jay Fowler, Jim Croteau, Jon VanAmringe, Connie Bender; Recording Secretary Stu Marckoon, Appellant’s Attorney Ed Bearor, Planning Board Chair John Holt, Code Enforcement Officer Michael Jordan, Planning Board member Don Bamman and Valerie Sprague

**Minutes, May 14, 2014** – Jim moved to approve the minutes as presented. Jay 2<sup>nd</sup>.  
**Vote in favor was 5-0.**

**Gott v. Lamoine Planning Board** – Jon asked attorney Bearor what percent of the proposed 70,000 cubic yards of material to be removed is gravel. Mr. Bearor said he did not know. Jon asked what the stumpage fee for gravel was. Jay answered \$2.50 to \$3.10 per cubic yard. Jon asked how big the proposed building would be. Mr. Bearor answered 3,200 square feet. Jon asked what the estimated construction cost for the building would be. The board checked the construction application and could not find an estimated cost. Jon asked if the building would be attached to a septic system. CEO Jordan said no. Jon asked if the building would be hooked up to electricity and water. It was answered there would be no water. Jon asked what the cost to build a bare bones building would be. Mr. Bearor answered he guessed \$75 to \$100 per square foot.

Jay asked if the proposal did not include moving gravel, would there have been a different outcome to the permit application. Jim said it likely would have been granted. Griff said if the building were not built lower as proposed, it would be right in the neighbor’s back yard. He said the proposal was creative by going below the ground level. He said the permit might not have been approved if the building were on eye level with the neighbors. He said sections J, J1 and J2 of the Site Plan Review Ordinance are an interesting concept of how the sections work together.

Jon said there had been a comment was that this was an end run to just dig gravel where the town had said the appellant could not dig in a previous case. He said it occurred to him to figure out what the trade off is. He said if 80% of the material were gravel, it would be worth about \$156,000. He said the building cost is between \$240,000 and \$320,000. He said based on the figures, this does not seem to be a creative way to dig gravel and a bad business decision if it were. He said he needs some reassurance on a number of issues. He asked what assurance there is that this project would be done within a year, and what assurance there would be that the berm and trees are installed to ensure the site lines are what the applicant say they will be. He said this is different than a usual building issue. He said the town is dealing with the sand and gravel issue this month, and there has not been a lot of compromise from either side on that issue. He said the town needs to be reassured that the project would be constructed as proposed with penalties imposed if it does not look the way the application says it will. He said to Mr. Bearor that his client needs to be told to be a good community citizen. He said he’s willing to stretch the issue and to have less digging in of heels and more compromise. He said this is a big issue, and just five people are casting

an opinion. He said this piece of land could be made to look a whole lot nicer after seeing the location. He said Jim had mentioned last meeting that it is hard to write an ordinance that covers all the issues. He said people need some expectations over what they can do. He said he's still thinking about a solution. He said it seems to be a bad business decision to build a building out of spite for having a gravel permit denied. He restated that he wants to see assurance that the project is done in the proper period of time and looks like what the plans say it will.

Mr. Bearor said his client, Mr. Gott, welcomes the opportunity to find common ground. He said the ordinance gives the Planning Board the ability to impose conditions. He said if the Appeals or Planning Board wants to impose a sequence of events, they would be open to that. He said they could make a condition to have the project look like the picture on the application. He said it's a pretty standard building.

Jon said he didn't want to extend a compromise; have the project start; have 70,000 yards of gravel removed; and then have the applicant stop. Mr. Bearor said it is a pretty small project compared to other projects and his client would not shy away from it.

Planning Board Chair John Holt said the discussion is for the Planning Board, not the Board of Appeals. He said the Planning Board is familiar with the application. Jon said he wanted to put out his thoughts. He said the Appeals Board has 3-choices; they can say the Planning Board erred; send it back to the Planning Board for reconsideration; or they could say the Planning Board decision was OK. He said the entire matter hinges on appearance.

Jim said he too wanted an assurance that this was not an end run around a gravel extraction permit. Rev. Holt said that was not part of the Planning Board decision. Griff said it was part of the Planning Board answer. There was a brief exchange between Griff and Rev. Holt.

Griff said he wants the community to get along, and some in the community have an issue with the gravel industry. He relayed a story about the building of the athletic fields behind the school in which the gravel contractors donated time, equipment and materials to make it happen. He said he would like to see the community make some accommodations, and that has to come from the Planning Board. He said perhaps the community could be zoned in such a way to make accommodations for both residents and the gravel contractors.

Jim said perhaps the Appeals Board should start with item "c" on the agenda item – the decision, instead of item "a" – the findings of fact. He said in other words, the board should decide what it is going to do by taking a vote and then decide how to come up with the answer. Griff said this is not an easy decision. He read a lengthy prepared set of notes (attached at the end of these minutes).

Griff said the Planning Board had acted on two previous applications and implied the purpose of this was to extract gravel. He said if this were an urgent project, the construction would take less than a year. He said under this proposal, the neighborhood could be subject to less disturbance. He said the Appeals Board has to evaluate if the

Planning Board erred by denying the permit because the application would not minimize soil disturbance. He said it appears the Planning Board believes that gravel disturbance is different from soil disturbance. He said there is no criterion in the Site Plan Review Ordinance for such a standard and read from section J2.

Griff said there is no question that the applicant is using creativity and innovation. He said the project as proposed would have a minimal adverse impact on neighbors and there would be a better view with a berm. He said if the criterion of preserving and enhancing the landscape were adhered to strictly, nothing would ever happen. He said there is no criterion for how many trees can be removed or how much soil can be disturbed in the ordinance. He said section J1 was the reason cited by the Planning Board for denial, but there are no criteria set for that section. He said applicants need specific criteria for guidance. He said the Planning Board has total discretion and an applicant should be able to get an answer from the ordinance for what is needed. He said in this case the ordinance states only soil disturbance; there are no numbers on how much is permitted or not permitted. He said he's been wrestling with this issue for the past two weeks. He said 70,000 yards is not anywhere in the ordinance.

Jon asked that Griff's statement be added verbatim to the minutes. Griff said he would send them along electronically (they are attached at the end of the minutes).

Jim said he agrees that the gravel issue has polarized the town. He said he does not see the role of the Appeals Board as making a blanket decision on an individual case. He said everything seems to depend on whether the proposal is from a pit owner or not. He said if this application were from someone else, he wonders if it would be looked at differently. He said this is not about construction of a gravel pit – it's about a garage. He said it was extremely useful to look at the site. He said he's not sure what the Planning Board would have done if absolute minimal soil disturbance were proposed. He said having a building on top of the existing soil would have been a huge eyesore. He said he can't imagine the ordinance would have preferred that over something better. He said he is a little troubled this was proposed on the same property that was denied a gravel permit. He said allowing the building to be built as proposed is a better option. He said it's not a gravel pit case. He asked where it makes sense to place a garage and said he would vote to overturn the Planning Board decision.

Griff said there is a potential opportunity in regard to a geothermic building. Jim said he thinks it is difficult to craft specific ordinances. He said there is always room around the edges. He said if one looks at the literal meanings, it's easy to minimize soil disturbance. He said he does not think this is a case where soil disturbance is the real issue. He said the ordinance is there to balance property owners' rights.

Jay said he thought it was a real good idea to set the building down as proposed. He said only a half to a third of the material underneath is good gravel – he said most of it is clay and junk. He said if the applicant were going to do this project to get good gravel, they would have proposed excavating further down the hill. He said it was good that the Appeals Board got a look at the site.

Connie said the issue is whether the Planning Board made the right decision based on the ordinance. She said the Appeals Board can't make a judgment on gravel pits. She said to her it is better if the neighbors can't see the building. She said the site looked like a moonscape, and if the building were constructed as planned it might be better or might be worse, the Appeals Board doesn't know. She said she did not think it was the Appeals Board decision to make. She said what the applicant did was creative. She said she feels the building is impractical and does disturb too much soil. She asked whether it would look better if set lower.

Griff said we don't know how much soil is there. He said he believed the Planning Board was using a vague catch-all phrase with no criteria when denying the Site Plan Review permit. He said the applicant referred to 70,000 cubic yards of material. He said it appeared there wasn't much soil in the first place. He said material is totally different than soil. He said the project is trying to find a way to keep things beautiful. He asked if the ordinance could include criteria similar to the Shoreland Zoning Ordinance does in regard to trees and parking lots. He said the Planning Board might be well served by that.

Connie said if she were an abutting property owner she would be concerned by noise, traffic and dust. Griff said he would like to see the project completed in 180-days. Jay said that wouldn't be possible. Jon said he was not suggesting that the Planning Board impose restrictions, but that it is put back to the Planning Board with a requirement for some conditions.

**Decision** – Connie moved to consider agenda item C-3. Jay 2<sup>nd</sup>. **Vote in favor was 5-0.** Jon moved to find that the Planning Board erred on Site Plan Review criterion J1 and to return the matter to the Planning Board with instruction that a completion time frame be specified with a limited construction time and a priority placed on fashioning a buffer for the adjoining home in agreement between the applicant and the Planning Board. Connie 2<sup>nd</sup>. **Vote in favor was 5-0.**

**Findings of Fact** – Stu suggested that the Board start with the basics, such as finding that the Planning Board denied the Site Plan Review Permit. Rev. Holt asked the chair to clarify that Stu is the recording secretary and not a member of the board.

Griff said that one fact is that the Planning Board denied a Site Plan Review Permit to Doug Gott and Sons because it did not comply with Section J1 of the ordinance in regard to soil disturbance; that the vote was 0-5 and there was a hand written notation on the written decision.

Griff said another fact would be that the Appeals Board received no information on the amount of soil that would be disturbed. Jim said he is not willing to agree to that.

Jim said a fact would be that if the site were viewed from the perspective of a neighbor, the proposed construction of the garage minimized the impact on the view. Griff said that would mean the applicant, in complying with the other section, overrides the soil disturbance issue. Jim said the fact is that it's the way that it looks. There was a discussion about soil disturbance information or the lack thereof.

Jon said this is a construction issue, not a gravel issue. He said it's not an end around the gravel extraction ordinance. Griff said the question is whether the Planning Board made an error. A discussion followed on what are facts and what are conclusions of law.

Jim said the applicant had two alternatives; minimize soil disturbance or not and use the plan for the lower building with an improved view impact. He said that creates a conflict between provisions of the ordinance. Connie said she didn't think the Appeals Board has to determine how much disturbance is OK or not. Jim said the ordinance should be viewed in its entirety and section J1 should not control.

Jon said one fact could be that the proposal disturbs 70,000 cubic yards of material of which potentially 80% could be gravel, and setting a mid-range stumpage price of \$2.80 per yard gives potential revenue of \$156,800; that the cost of constructing the garage is between \$240,000 and \$320,000 and based on the numbers that it is unlikely that the action is a viable alternative for the purpose of gravel removal.

Jim said another fact is that the garage as proposed will minimize the visual disturbance as opposed to a garage built at the natural ground level.

Connie said another fact could be that the Appeals Board does not have the exact amount of how much soil disturbance is too much, the ordinance wording is vague. Jim said it could be less than 70,000 cubic yards and he would like to vote individually on the facts.

#### **Votes on Individual Findings of Fact –**

**Fact 1** - The Planning Board denied a Site Plan Review Permit to Doug Gott and Sons because it did not comply with Section J1 of the ordinance in regard to soil disturbance; that the vote was 0-5 and there was a hand written notation on the written decision. Jim moved to find this statement as fact. Jon 2<sup>nd</sup>. **Vote in favor was 5-0.**

**Fact 2** - The proposal disturbs 70,000 cubic yards of material of which potentially 80% could be gravel, and setting a mid-range stumpage price of \$2.80 per yard gives potential revenue of \$156,800; that the cost of constructing the garage is between \$240,000 and \$320,000 and based on the numbers that it is unlikely that the action is a viable alternative for the purpose of gravel removal. Jon moved to find this statement as fact. Jay 2<sup>nd</sup>. **Vote in favor was 5-0**

**Fact 3** - The garage as proposed will minimize the visual disturbance as opposed to a garage built at the natural ground level. Jim moved to find this statement as fact. Connie 2<sup>nd</sup>. **Vote in favor was 5-0.**

**Fact 4** - The exact amount of how much soil disturbance is too much makes the ordinance wording vague. Connie moved to find this statement as fact. Jay 2<sup>nd</sup>. **Vote in favor was 3-2 (Crotteau, VanAmringe opposed).** Jon said he agreed that the

language of the ordinance is vague, but he dissented because the issue was not relevant to the matter before the Board of Appeals.

**Conclusions of Law** – Jim prepared the following conclusion (the handwritten page is in the case file):

The provisions of J1 and J2 (of the Site Plan Review Ordinance) are in conflict with respect (to) this proposal. If the garage is built at existing ground level – thus “minimizing disturbance of soil” (J1) – it will have significant “adverse effect on the aesthetic qualities of the neighboring area.” In the view of the Appeals Board, allowing the garage to be constructed as proposed will give full effect to J2 and will be consistent with the purpose of the site plan review (ordinance) set out in F2, namely, to balance the rights of the landowners to use their land with the corresponding rights of abutting and neighboring landowners to live without undue disturbances.

Jim moved to approve the above conclusion of law. Jay 2<sup>nd</sup>. **Vote in favor was 5-0.**

**Other Matters** – Griff asked about the upcoming meeting with FEMA on the flood plain maps. Stu said it’s Wednesday, June 11, 2014 at Ellsworth City Hall. Jon said he planned to attend.

Jim said the Board of Appeals needs to give the Planning Board some direction. Jon said the Planning Board should be asked to consider, in conjunction with the applicant, to become specific on a time frame on when the building will be constructed. He said both parties have a concert of interest on the berm and tree barrier. He said appropriate penalties and restrictions should be available to ensure that the project is done in a timely fashion. Jim said it should be completed within a year, and he would not like to see a lot of slippage with that. He said the construction start and finish dates should be specified and the work should be a collaboration of the Planning Board, the applicant and any interested abutters.

Jon said the Appeals Board should do a deliberate review of the draft minutes. Jim asked if the Board should get together as a group for final approval. Stu noted that according to newspaper reports, another appeal will likely be filed soon.

Appeals Board Ordinance – There was discussion about having a workshop on an Appeals Board Ordinance and consideration of the minutes simultaneously. It was agreed the minutes would be finalized at the next meeting and that drafts via e-mail with corrections would be coordinated through the town office.

Next Meeting Date – The Board informally agreed that the date is open at this point and the next meeting date will be determined.

There being no further business, the meeting adjourned at 8:20 PM

Respectfully submitted,

Jon VanAmringe, Secretary

jva:sem

Comments from Chairman Hancock “Griff” Fenton – June 4, 2014

The Appeals Board has completed the input from both parties in the Doug Gott v Planning Board of Lamoine. We now come to the decision of whether the Planning Board erred or misinterpreted the Site Plan Review Ordinance Section J-1, which states:

#### J General Review Standards

The following criteria and standards shall be utilized by the board in reviewing applications for the site plan reviewing applications for site plan review approval. The standards are not intended to discourage creativity, invention and innovation. The board may waive the criteria presented in this section upon a determination by the board that the criteria are not applicable to the proposed action or upon a determination by the board that the application of these criteria are not necessary to carry out the intent of this ordinance. The board shall approve the application unless the proposal does not meet the intent of one or more of the following criteria provided that the criteria were not first waived by the board.

##### 1. “Preserve and Enhance the Landscape.

The landscape shall be preserved in its natural state insofar as practicable by minimizing tree removal, disturbance of soil, and retaining existing vegetation during construction. After construction is completed, landscaping shall be designed and planted that will define, soften or screen the appearance of the development and minimize the encroachment of the proposed use on neighboring land uses.

Environmentally sensitive areas.....

The Planning Board stated that the applicant had submitted two applications for a gravel extraction permit for this property. The board infers that the applicant’s real intention may be to extract gravel while not requesting another gravel extraction permit. There appears to be some credence to this theory. During our meetings, the applicant mentioned that it would remove the soil and build the building in about one year. If the intent to build a building of this size were urgent, the building and the removal of the material would take far less than a year. They build Wal-Mart’s and Home Depots in that period of time or a little longer. During this yearlong construction the neighbors would be subjected to the construction equipment noise.

The applicant could remove the material and put it in an authorized gravel pit and proceed with the construction of the building. This approach would take less than one year and subject the neighborhood to far less disturbance.

We are not here to decide how to best decide how to minimize construction or noise. A property owner may change the use of his property. He has a right to do so. However, this is not our duty. We are here to do only one thing.

We are here to evaluate if the planning board erred or misinterpreted the ordinance.

The applicant was denied the permit because it would “not minimize disturbance of soil.” According to the response of the planning board they discussed “that excavations from which more than 500 cubic yards of sand, gravel, crushed stone, soil and loam are to be removed require a Gravel Permit from the town, a permit which the applicant did not have.”

The planning board or the applicant did not give any specific quantity of any of these materials. How much was clay, soil, gravel etc.? It appears that the board believes that soil is different than gravel, crushed stone etc. as described in the above quote. The applicants information is that the materials they wish to remove are made up of clay, gravel, stone and soil.

It may be inferred from the above that disturbing less than 500 cubic yards of soil is minimizing the disturbance of soil. Over that amount would be reasons for denial. However in the ordinance there are no criteria. Also, we have had no indication of how much soil is to be disturbed.

The Site Plan Ordinance J references “the standards are not to discourage creativity, invention and innovation.” Additionally, we see in

#### “Section J-2 Relation of Proposed Buildings to Environment

Proposed structures shall be related harmoniously to the terrain and to existing buildings in the vicinity that have a visual relationship to the proposed structures, so as to have a minimally adverse affect on the environment and aesthetic qualities of the developed and neighboring areas including historic buildings and sites.”

There is no question that the applicant has used innovation and creativity in placing the building below the natural ground level. The creation of the berm and trees with the lower building would “have a minimally adverse affect on the environment and aesthetic qualities of the developed and neighboring areas.” The neighbors view would be improved with the construction of the berm and trees. Additionally, they could not see the building. If there were no excavation, the building would be in plain sight of the neighbors view.

Additionally, the applicant for any permit in a municipality should be clear, so the applicant knows what is expected when he submits the application. We see in the General Review Standards a purpose the board wishes achieve. Preserve and Enhance the Landscape is vague. If you hold to the strict meaning, there would be no activity in town. Going beyond the strict meaning, what is too much so that you would not enhance or preserve the landscape? In Section 1 it states “the landscape shall be preserved in its natural state insofar as practicable by minimizing tree removal, disturbance of soil and retaining existing vegetation during construction.” There are no criteria for how many trees may be removed or how much soil can be disturbed. Other ordinances give specific criteria for guidance. The Shoreland Ordinance sets limits on tree removal with specific measurements and volumes. Other sections of the Site Plan Review Ordinance have specific criteria: driveways, parking and noise - just to mention a few.



It is clear that J-1 is there to present a purpose the planning board desires. One would assume that they are not for the strictest meaning of the Section J-1. However, they do not set forth criteria in which to accomplish the purpose. Having no criteria, it permits the board to have unlimited discretion in which applications they approve or deny. We need specific criteria to guide an applicant. The applicant is entitled to know with reasonable clarity what they must do under local ordinances to obtain the permits or approvals that they seek. Absent criteria, the applicant is not being given a direction in his submission of the application. The planning board has total discretion of denial and acceptance of the application based upon no quantifiable criteria. The applicant should be entitled to have the following question answered: What must I present to gain the boards approval?

There is no baseline in the ordinance for how much soil may be disturbed. There is no amount of soil identified for disturbance.

In the planning boards written response it states “...the extraction of 70,000 yards of **material** to prepare the site as desired.” The ordinance states nothing about material removal for a site. It states only soil disturbance and we have no idea what amount of soil is involved or is permitted.

Recognizing that the ordinance is not clear in any specifics, it presents itself as a purpose with no criteria. There is no definition in the ordinance of how much soil disturbance is permitted. Likewise, there is no provision in the ordinance stating how much soil disturbance is not permitted.

Since we are limited to just answering the question:

Did the planning board err or misinterpret section J-1 in denying the Gott Site Plan Application?

After careful deliberation I find the following:

The sections J, J1 and J2 of the ordinance are purpose standards. They are vague and open to various interpretations of which an applicant has no idea on how to comply, as there are no criteria.

Preserve and Enhance the Landscape and minimal disturbance of soil are immeasurable and lacking in cognitive quantitative standards.

All applicants are entitled to know what they must do under the ordinance to obtain the permits they are seeking. Section J-1 does not permit the applicant this option.

That by complying with sections J-2 and J the applicant attempted to adhere to the intent and purpose of the ordinance

There are no criteria for how much soil is being disturbed, and how much disturbance of soil is permitted.

The applicant had no guidelines as to how much soil could be disturbed